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QUESTIONS PRESENTED

1. Whether the district court's order and redistricting plan are reviewed under the clearly erroneous standard?

2. Whether the district court properly applied Georgia's traditional districting principles to give expression to the state's uncoerced and constitutional policy choices while still providing a complete remedy of the racial gerrymandering that rendered the 1992 plan unconstitutional?

3. Whether the Voting Rights Act mandates the retention of District Eleven as a majority minority district?

4. Whether the evidentiary hearing on remedy afforded Appellants a full opportunity to articulate their contentions respecting the constitutionality of the Second District and the district court's remedial obligations under the Voting Rights Act?

5. Whether the Court Plan's *de minimis* population deviation between districts violated Article 1, § 2 of the Constitution?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. The Unconstitutional Districts	2
B. The Court's Plan	4
C. The 1991 Unprecleared Plan	6
D. The DOJ's Illustrative Plan	9
E. The ACLU's Plans	11
SUMMARY OF ARGUMENT	13
ARGUMENT	16
I. THE DISTRICT COURT'S ORDER IS NOT CLEARLY ERRONEOUS	16
A. The District Court Afforded Appellants A Full Opportunity To Present Evidence As To A Proper Remedy	19
II. THE DISTRICT COURT PROPERLY EXERCISED ITS EQUITABLE POWERS TO REMEDY RACIAL DISCRIMINATION	21
III. SECTION 2 DOES NOT MANDATE RETENTION OF THE ELEVENTH AS A MINORITY DISTRICT	27
A. The ACLU's Expert Did Not Support The Contention That Section 2 Required Two Majority Minority Districts	33
B. The Appellants Offered No Evidence Of Racially Polarized Voting At The Remedy Hearing	34

TABLE OF CONTENTS—Continued

	Page
IV. THE COURT PLAN IS NOT RETROGRESSIVE	37
V. THE COURT PLAN HAS A DE MINIMIS POPULATION DEVIATION BETWEEN DISTRICTS	42
CONCLUSION	47

TABLE OF AUTHORITIES

CASES — Page

Adarand Constructors, Inc. v. Pena, —— U.S. ——, 115 S.Ct. 2097 (1995) 27
Beer v. United States, 425 U.S. 130 (1976) 38, 39, 40
Burton v. Sheheen, 793 F.Supp. 1329 (D.S.C. 1992), *vacated and remanded sub nom. SRAC v. Theodore*, —— U.S. ——, 113 S.Ct. 2954 (1993) 20, 21, 26, 38, 39, 42
Bush v. Vera, —— U.S. ——, 116 S.Ct. 1941 (1996) 14, 29, 30, 40
Chapman v. Meier, 420 U.S. 1 (1975) 23, 42, 43
Chisom v. Roemer, 501 U.S. 380 (1991) 30
City of Lockhart v. United States, 460 U.S. 125 (1983) 40
City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 27
City of Rome v. United States, 446 U.S. 156 (1980) 17
Connor v. Finch, 431 U.S. 407 (1977) 21, 42
Connor v. Johnson, 402 U.S. 690 (1971) 18, 37
Corbin v. Cannon, 838 F. Supp. 561 (M.D. Fla. 1993) 31
DeGrandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992) 8
Edge v. Sumter County School Dist., 775 F.2d 1509 (11th Cir. 1985) 20
Freeman v. Pitts, 503 U.S. 467 (1992) 22, 27
Georgia v. Reno, 881 F.3d 7 (D.D.C. 1995) 15
Green v. County School Bd., 391 U.S. 430 (1968) 22, 23
Growe v. Emison, 507 U.S. 25 (1993) 27
Hathorn v. Lovorn, 457 U.S. 255 (1982) 18
Holder v. Hall, —— U.S. ——, 114 S.Ct. 2581 (1994) 8, 9, 40, 42
Johnson v. DeGrandy, —— U.S. ——, 114 S.Ct. 2647 (1994) 16
Johnson v. Miller (Johnson I), 864 F. Supp. 1380 (S.D. Ga. 1994), *affirmed*, 515 U.S. ——, 115 S.Ct. 2475 (1995) ..... *passim*
Johnson v. Miller (Johnson II), 922 F. Supp. 1552 (S.D. Ga. 1995) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Johnson v. Miller (Johnson III), 922 F. Supp. 1559 (S.D. Ga. 1995) ..... *passim*
Johnson v. Miller, 929 F. Supp. 1529 (S.D. Ga. 1996) 38
Johnson v. Mortham, 926 F. Supp. 1460 (N.D. Fla. 1996) 8, 26, 30, 32, 36, 37
Karcher v. Dagget, 462 U.S. 725 (1983) 45
Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984) .. 37
Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC 478 U.S. 421 (1968) 23
McDaniel v. Sanchez, 452 U.S. 130 (1981) 5, 37
Miller v. Johnson, 515 U.S. ——, 115 S.Ct. 2475 (1995) ..... *passim*
Milliken v. Bradley, 418 U.S. 717 (1973) 23
Missouri v. Jenkins, 115 S.Ct. 2038 (1995) 26, 28
Perkins v. Matthews, 400 U.S. 379 (1971) 18
Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) 18
Reynolds v. Sims, 377 U.S. 533 (1964) 42, 44
Rogers v. Lodge, 458 U.S. 613 (1982) 17
SCLC v. Sessions, 56 F.3d 1282 (11th Cir. 1995) 36
SRAC v. Theodore, —— U.S. ——, 113 S.Ct. 2954 (1993) 20, 21
Shaw v. Hunt, —— U.S. ——, 116 S.Ct. 1894 (1996) 26, 30, 33, 37, 42
Shaw v. Reno, 509 U.S. 630 (1993) 13, 14, 15, 27
Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) 22
Thornburg v. Gingles, 478 U.S. 30 (1986) 16, 17, 21, 23
United States v. Dallas County Comm'n, 850 F.2d 1433 (11th Cir. 1988) 8, 9
United States v. Edgar, 404 U.S. 1206 (1971) 22
United States v. Paradise, 480 U.S. 149 (1987) 22
United States v. United States Gypsum Co., 333 U.S. 364 (1948) 17
Upham v. Seamon, 456 U.S. 37 (1981) 23, 24, 25, 44
Voinovich v. Quilter, 507 U.S. 146 (1993) 27, 28
Whitcomb v. Chavis, 403 U.S. 124 (1974) 26
White v. Regester, 412 U.S. 755 (1973) 17

TABLE OF AUTHORITIES—Continued

Page

Wright v. Rockefeller, 376 U.S. 52 (1964) 19, 22
Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 27, 29, 30
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 17

CONSTITUTIONS

U.S. Const. art. III 28
U.S. Const. art. I, § 2 ..... *passim*
U.S. Const. amend. XIV, § 1 ..... *passim*

STATUTES AND REGULATIONS

Voting Rights Act of 1965, §§ 2 and 5, 42 U.S.C. §§ 1973(b) & 1973(c) ..... *passim*
28 C.F.R. § 51.54(b) 37, 38, 41
28 C.F.R. § 51.55(b) 15

RULES

Fed. R. Civ. P. 52(a) 16, 17, 21
Fed. R. Evid. 201 31

LAW REVIEWS

Katherine Butler, Affirmative Racial Gerrymandering: Fair Representation for Minorities or A Dangerous Recognition of Group Rights, 26 *Rutgers L.J.* 595 (1995) 26
Kevin A. Hill, Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eighth Southern States, 57 *J. Pol.* 384 (1995) 30

ARTICLES

Juliana Greenwald, Deals Switch to GOP, 53 *Cong. Q. Wkly. Rep.* 1084 (1995) 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Nos. 94-1425, 95-1460

LUCIOUS ABRAMS, JR., *et al.*,
Appellants,

v.

DAVIDA JOHNSON, *et al.*,
Appellees.

On Appeal from a Three Judge Panel of the United States District Court for the Southern District of Georgia

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BRIEF OF APPELLEES

STATEMENT OF THE CASE

This case presents the question of the appropriate remedy for an unconstitutional racial gerrymander violative of the Equal Protection Clause of the Fourteenth Amendment where a federal court, rather than a state legislature, is required to draw the remedial plan. What is not at issue is the unconstitutionality of the two new majority minority congressional districts Georgia was forced to fashion following the 1990 census. The breadth of the racial gerrymandering that caused both the Second [1] and

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[1] All parties to the Second District litigation now concede District Two is unconstitutional. *See* Answer of the United States. No appeal was taken from that decision. As noted in *Johnson v. Miller*, 922 F.Supp. 1522, 1553 n.1 (S.D.Ga. 1995) (hereinafter referred to as *Johnson II*):

> The Department of Justice conceded that, *as a matter of law*, the Second District was unconstitutional considering . . . the Supreme Court's affirmance of . . . . [*Johnson v. Miller*, 864 F.Supp. 1354 (S.D.Ga. 1994)] [emphasis added].

Eleventh Congressional Districts to be struck down is amply described in the district court's three opinions [2] and in this Court's opinion in *Miller v. Johnson*, 515 U.S. ——, 115 S.Ct. 2475 (1995).

A. The Unconstitutional Districts.

Understanding the full scope and impact of race-based demography in the Second and Eleventh Districts is important to this case, because it provides a good gauge against which to measure the Appellants' allegations that the district court went beyond what was necessary to cure their constitutional deficiencies. With respect to the Eleventh District, both the district court and this Court found racial motivations permeated the entirety of its geography. Its predominate purpose, from its metropolitan fountainhead in south DeKalb County, to its long trek through sparsely populated majority black rural counties in east central Georgia, and ending in the black neighborhoods of urban Augusta and coastal Savannah,[3] was to maximize the number of minority voters in the district.

This Court did not base its conclusion that the Eleventh District's boundaries were predominantly based on race solely on the irregular shape of the district. The cosmetic changes Appellants propose would therefore do little to correct the overriding racial purpose of its architecture. A plethora of other facts confirmed the district's racial purpose, including the State's concession that " '[i]t is undisputed that Georgia's eleventh is the product of a desire by the General Assembly to create a majority black district.' " *Miller*, 115 S.Ct. at 2489. In deciding the

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[2] *Johnson v. Miller*, 864 F.Supp. 1380 (S.D.Ga. 1994) (hereinafter *Johnson I*) (Eleventh District held unconstitutional); *Johnson II*, 922 F.Supp. 1552 (Second District held unconstitutional); and *Johnson v. Miller*, 922 F.Supp. 1559 (S.D.Ga. 1995) (hereinafter *Johnson III*) (remedial plan promulgated).

[3] This Court described these minority populations as "260 miles apart in distance and worlds apart in culture." *Miller*, 115 S.Ct. at 2484.

question of whether race predominated, this Court agreed with the district court: the DOJ-mandated reliance on racial factors as the foundation of the Eleventh District was a systemic illness that could not be cured simply by cancelling the "Macon-Savannah trade." As noted in *Miller*, 115 S.Ct. at 2484:

> The Almanac of American Politics . . . [stated]: "Geographically, it is a monstrosity, stretching from Atlanta to Savannah. Its core is . . . lightly populated, but heavily black. It links by narrow corridors the black neighborhoods in Augusta, Savannah and southern DeKalb County."

The *Miller* Court credited the district court's findings on this issue in every important regard. *See id. passim.* All of these fact findings are *res judicata* in this case:

(1) "The evidence was compelling 'that there are no tangible 'communities of interest' spanning the hundreds of miles of the Eleventh District.' " *Miller*, 115 S.Ct. at 2490.

(2) The fact that "the boundaries of the Eleventh . . . follow many precinct lines . . . is because Ms. Meggers [4] designed the Eleventh District along racial lines, and race data was most accessible . . . at the precinct level." *Id.*

(3) This Court agreed with the district court in finding the " 'four discrete, widely spaced urban centers that [supply the district's minority population] have absolutely nothing to do with each other . . . .' " *Id.* at 2484.

(4) "In short, the social, political and economic makeup of the Eleventh District tells a tale of disparity, not community." *Id.*; *see also Johnson I*, 864 F. Supp. at 1376 & 1389-90.

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[4] Linda Meggers is the State demographer who was charged with the task of incorporating the Black-Max Plan into the State's plan. *Id.* at 2489.

(5) "The Justice Department would accept nothing less than abject surrender to its maximization agenda . . . [T]he General Assembly acquiesced and as a consequence was driven by its overriding desire to comply with the Department's maximization demands." *Johnson I*, 864 F. Supp. at 1366; accord *Miller*, 115 S.Ct. at 2489.

The very same maximization policies the United States Department of Justice (DOJ) employed to create the Eleventh District also forced the State to create a third majority minority[5] district in southwest Georgia. The Second District racially partitioned 12 of its 35 counties and 14 of its municipalities,[6] using "narrow land bridges"[7] to hold it all together. The district court was unanimous in finding the Second District unconstitutional.[8] Appellants do not seriously question the district court's remedy with respect to the Second District, focusing their appeal instead on the contention that Section 2 of the Voting Rights Act (hereinafter VRA) required the Eleventh District be maintained as a minority district.

B. The Court's Plan.

The chronology of events leading to the district court's preparation of a remedial congressional plan (hereinafter referred to as the Court Plan) are succinctly set forth in the order on appeal. *See Johnson III*, 922 F. Supp. at 1559. The district court clearly noted the Court Plan was

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[5] For ease of reference, Appellees hereinafter will refer to a majority minority district as a minority district.

[6] *See Johnson II*, 922 F.Supp. at 1554.

[7] *Id.*

[8] *Id.* at 1556. While the State did not formally concede the constitutional question, it entered into factual stipulations that admitted the predominance of race in its design, and the absence of any compelling state interest to justify race-based districting of the kind and nature found in the Second District. *See* Joint Stipulations filed with the Court on September 25, 1995.

not a legislative plan [9] returned to constitutional life by smoothing out a few gerrymandered edges. The large size of the two unconstitutional districts (which include almost a third of the state's 159 counties), their location on opposite sides of the state, and the rampant splitting of cities and counties caused the Second and Eleventh Districts to share racially gerrymandered boundaries with the First, Third, Fourth, Fifth, Eighth and Tenth Districts. These adjoining districts are unavoidably impacted by the ripple effect of curing the widespread gerrymandering this Court confirmed to exist in District Eleven and the district court chronicled in District Two. *See Johnson II*, 922 F. Supp. 1552 *passim*. The districts that did not adjoin the unconstitutional districts remain virtually unchanged.[10]

The district court drew on the 1972 and 1982 plans for the state's traditional districting principles and the historical cores of the existing ten districts.[11] *See Johnson III*, 922 F. Supp. at 1563-65. In so doing, the district court returned the districting process to the correct sequence. The original ten districts were pencilled in, with population deviation issues dictating line changes as well as where the new Eleventh District should be located. There is no racial agenda in such a common-sense approach to the issue. It allowed the district court to begin on the high

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[9] The district court did not want to leave itself exposed to Section 5 review should the DOJ argue the Court Plan was actually a "legislative plan" reanimated by the court. *See, e.g., McDaniel v. Sanchez*, 452 U.S. 130, 153 (1981); *Johnson III*, 922 F.Supp. at 1569.

[10] Districts Six, Seven and Nine were not significantly changed in the Court Plan. Any changes in District Nine were solely to accommodate the placement of District Eleven in a growth area of the state. *Johnson III*, 922 F.Supp. at 1563.

[11] Despite the degree of gerrymandering in the 1992 Plan, their criticism of the plan did "not mean that we ignored [it] . . . altogether, only that our consideration of it was tempered by its origins." *Johnson III*, 922 F.Supp. at p. 1561, n.2. The district court also solicited remedial plans from all parties based on the first plan Georgia submitted. *See* R.329 Order of October 30, 1995.

ground of a precleared plan; utilizing the benchmark plan as a starting point was the most effective way to give voice to the prior expressions of legisltative intent that were not contaminated by the DOJ's "shortsighted and unauthorized view of the VRA." *Miller*, 115 S.Ct. at 2494.

C. The 1991 Unprecleared Plan.

The district court also considered the legislature's first plan which was rejected by the DOJ.[12] The district court expressed valid concern about the value of this rejected plan as a guide to legislative intent. That concern tells us precisely why the district court did not view the first plan as a self-contained solution to a constitutional problem of this magnitude:

> The first 1992 Plan gave us a clearer understanding of legislative intent, but it was not a perfect guide since it contained many of the same features in its Eleventh District that found their way into the unconstitutional Eleventh—connecting the south DeKalb County urban minority population with the primarily rural east Georgia minority population.

Johnson III, 922 F. Supp. at 1563 n.9.

Appellants' main argument against the Court Plan is that the rejected first plan included two minority districts which Appellants contend are required by the Voting Rights Act. However, Ms. Meggers explained at trial that the origins of a second minority district stemmed from the DOJ's insistence that the VRA required the creation of all possible minority districts:

> Meggers: To be honest . . . I was partly at fault for drawing it like we did in 1991. [It was based on] my understanding of [what] I thought the Department of Justice was going to make us do . . . . [At

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[12] *See Johnson III*, 922 F.Supp. at 1563. Appellants contend this first plan reflected the "true" state districting policies and intentions with respect to the creation of a second minority district. As will be seen *infra*, the evidence is to the contrary.

> first] none of the ways I drew it ever showed a total of a 50 percent minority population . . . . At the first public hearing, we were presented . . . a map . . . that . . . drew it from South DeKalb over to Augusta and then to Macon. The initial response in our office was that's ridiculous. We don't have to draw that . . . . I was the one who said if it was there we have to draw it. It was said that it doesn't make any sense and I said maybe not, but . . . we may get into trouble with the Justice Department if we don't draw it . . . like that and I think that was the main reason they [drew it] . . . .[13]

The primary source of Georgia's trepidation came from a seminar Meggers and the reapportionment committee attended in Baltimore in 1990 where John Dunne, then the Assistant United States Attorney for Civil Rights in charge of the Voting Rights Section, spoke. The legislators came away feeling "threatened." Georgia was publicly singled out as a known violator of the VRA. They left believing the DOJ would demand maximization as the *quid pro quo* for preclearance; they were right. *See* Testimony of Rep. Sonny Dixon, R.Tt. 80-81 ("we were threatened [and] used as an illustration by Mr. Dunne of [all] that was evil in redistricting"); Testimony of Rep. Bob Hanner, R.Tr. 73-75 (obligation to create all technically possible minority districts); Deposition testimony of Speaker Thomas Murphy, pp. 6-7 read into the record at R.Tr. 78 ("Mr. Dunne and the Justice Department . . . told us we had to have more black majority districts . . .").

Appellants rely heavily on pre-*Miller* statements by the Appellee Murphy and arguments made by the State's counsel regarding the first plan the legislature passed in 1991 and the DOJ rejected in 1992. ACLU Brief, 35-36. These comments were both made during the pendency of the Eleventh District litigation wherein the State was

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[13] Remedy Hearing of October 30-31, 1995 [hereinafter R.Tr. 431-432].

contending "bizarreness" was a necessary element of the *Shaw* cause of action.[14] The fact Speaker Murphy or the State's counsel believed the first rejected plan was not as bizarre as the adjudicated plan does little for its post-*Miller* constitutionality. Moreover, the Speaker's advisor, Linda Meggers, has testified as to her reasons for soliciting support for the first plan within the Legislature. That testimony readily shows that race was the predominant factor relied on by the State's demographer.

Ms. Meggers was not alone in her understanding of the DOJ's position in 1991. Even the courts routinely defined the reach of Section 2 in terms of how many minority districts were possible. For example, the Florida congressional district found unconstitutional in *Johnson v. Mortham*, 926 F. Supp. 1460 (N.D. Fla. 1996), was drawn by a three judge court. *See DeGrandy v. Wetherell*, 794 F. Supp. 1076, 1085 (N.D. Fla. 1992). The *Wetherell* court expressed the following view which, at the time, was widely held:

> [A]lthough respecting traditional county boundaries is a desirable approach, this aesthetic requirement should not undercut the primary goal of creating minority districts.

Id.

In holding the *Wetherell* court's Third District unconstitutional, the court in *Mortham* put their finger on the problem that was the genesis for the *Shaw* cause of action:

> The reason for this line of jurisprudence [*Shaw, Miller*, et al.] is because the [Voting Rights] Act had been used by federal courts, the states, and the [DOJ] to create "racially 'safe' boroughs" for different racial and ethnic groups. *Holder v. Hall*, . . . 114 S.Ct. 2581, 2598 . . . (1994) . . . (quoting *U.S. v. Dallas*

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[14] This Court rejected that claim. *Miller*, 115 S.Ct. at 2486 (bizarreness is not "a necessary element of the constitutional wrong or a threshold requirement of proof").

> *County Comm'n*, 850 F.2d 1433, 1444 (11th Cir. 1988) . . . . As Justice Thomas recognized, "that practice now promises to embroil courts in a lengthy process of attempting to undo, or at least minimize, the damage wrought by the system we created." *Holder*, . . . 114 S.Ct. at 2598 . . . [T]he rule from the Supreme Court decisions is clear: Congress did not pass the [VRA] to replace a system of economic and social segregation with a system of political segregation.

926 F. Supp. at 1485. Ms. Meggers was, therefore, in step with then-current thinking in 1991-92 as to what the VRA required: the creation of all possible minority districts.

Ms. Meggers also testified to the consideration the legislature gave to continuing the Eleventh as a minority district during the 1995 Special Session, and why the legislature concluded it was not constitutionally possible. R.Tr. 434.[15] The state's attorney confirmed that was his counsel as well, stating "[w]e very much disagreed [with the DOJ and ACLU] that section 2 mandates there be two black majority districts . . . ." R.Tr. 384.[16]

D. The DOJ's Illustrative Plan.

To achieve the overriding racial purpose of all three configurations of the Eleventh District demanded by the DOJ during the 1991-92 redistricting process, the State was forced to misappropriate the historical cores of four

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[15] *See* Plaintiffs' Motion to Affirm, p. 12 (quoting from testimony).

[16] At the remedy hearing, counsel reiterated the State's belief that the first plan was unconstitutional:

> The overall purpose and architecture of the Eleventh that runs from DeKalb to Richmond County to Macon in plan One was all for a racial purpose . . . . [I]t is now a fact that the purpose of that district was borne upon a racial basis and the line drawn in that fashion for that purpose. That in and of itself makes the Eleventh District, going out through east central Georgia . . . unconstitutional. (R.Tr. p. 320).

adjoining districts.[17] Two of those misplaced cores are still included in the DOJ plan. Also, the DOJ's Plan actually intensifies the racial line drawing in DeKalb and Bibb Counties, because the DOJ did not respect precinct lines in its efforts to include black, and exclude white, voters. *See* DOJ Brief, 19.

The DOJ does not articulate, much less prove, a non-racial reason for the division of these urban areas, or offer any community of interest which justifies placing Macon's black population in a district centered in the metropolitan Atlanta area. Macon is the traditional capital of middle Georgia, a very different region from metro Atlanta. It has been the commercial core of the Eighth District for decades. It is wholly contained in Bibb County, a county that has never been divided in any congressional plan. Bibb County's division was cited as evidence of unconstitutional racial gerrymandering. *See Johnson II*, 922 F. Supp. at 1555 n.4.

The district court also noted that "[b]efore 1992, the Second District included no portions of the City of Columbus . . . , [and] no split counties" and that the racial split of Columbus was essential to the Second becoming a minority district. *Id.* at 1554.[18] A proper remedy would have to reunite those cities and counties held to have been unconstitutionally gerrymandered. However, Appellants have not done so.

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[17] South DeKalb was the historical core of the Fourth; Augusta/Richmond County was the core of the Tenth; Macon/Bibb County was the core of the Eighth District; and Savannah was the core of the coastal First District.

[18] The Appellants' alternative plans do not properly adjust the black population figures for the Second to discount the sizable non-voting military population at Ft. Benning in Columbus. When that is done, the Second remains a minority district and Appellants have achieved the once unthinkable: lose both cases yet maintain both minority districts.

E. The ACLU's Plans.

The ACLU bases their case on two interrelated contentions. First, they assert that racial bloc voting generally prevents election of minority candidates.[19] Second, they argue their alternative plans demonstrate that a minority remedial district complying with Georgia's traditional districting principles can be drawn in the area where the Eleventh District is located.

All suffer fatal flaws:

(1) *Abrams A* (J.A. 195): This plan retains both the Second (54.45%) and Eleventh (56.56%) as minority districts by leaving 9 of the original 12 counties racially divided in the Second and 3 of 8 in the Eleventh. Its overall deviation (.29) is not meaningful because the district court specifically found its perpetuation of racially divided counties and cities to be unconstitutional. It also lacks contiguity, apparently due to computer error. DOJ Brief, 6 n.4. It is unknown what the deviation would be when contiguity is restored and the unconstitutionally divided counties reunited. We do know that the next lowest overall deviation for an ACLU sponsored plan is .94 (ACLU-IA Plan, J.A. 198).

(2) *Abrams C* (J.A. 197): This plan's overall deviation is .99 which Appellants now contend is unconstitutional. The same is true for the ACLU IA Plan (.94 overall deviation).

(3) *Lewis-Gingrich Amici-R Plan* (J.A. 193) has an unconstitutional overall deviation of 1.86. Donald Hill was the demographer for the plan. He was employed by the Georgia Republican Party. Deposition of Donald Hill,

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[19] Appellants tie their case to this contention:

> [T]he showing that must be made to establish a Section 2 claim [is] that candidates of choice of African-Americans in the area of the 1992 Eleventh District can win *only* if African-Americans form a majority of the constituency. DOJ Brief, 29.

pp. 4-5.[20] He also did work for the ACLU. *Id.* at 7. In 1991-92, he assisted in the development of the three minority district plans which became the Black Max Plan. He believed a minority district should be drawn if it was technically possible to do so. *Id.* at 20. His stated reason for retaining the racial divisions of Columbus, Macon, DeKalb County and other split counties and cities in his clients' proposed plan was allegedly for "political advantage." Yet, he admitted race was the sole proxy by which such advantage was sought:

> Question: "[Y]ou understand these lines [split cities and counties] were . . . race drawn?
>
> Hill: Initially . . . They're race drawn and they're also politically drawn.
>
> Question: "[W]hen you say politically, you're . . . referring to the fact . . . blacks vote predominantly Democratic . . . , that's the political dividing line you're using . . .?
>
> Hill: I think it's legitimate, yes, they do generally vote Democratic.
>
> Question: In other words, the political line and the racial line [are] synonymous . . .
>
> Hill: Yeah, I'll concede that they do. Yes."

Id. at 49-50; *accord, id.* at 51-52 (Bibb County racial split synonymous with his "political" split).[21]

Mr. Hill also drew the Abrams C Plan advocated by the ACLU. *Id.* at 72-73.[22] He understood his goal was

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[20] Mr. Hill's deposition was admitted into evidence. R.Tr. 342-343.

[21] *See* J.A. 204-206. These race maps of the three major urban areas each of Appellants' alternative plans divided on racial lines depict racial density by color: yellow is 60% or greater minority population; orange is 50% to 59% minority and blue is 35% to 49%, with grey being less than 35% minority. R.Tr. 29.

[22] *See* Abrams C (J.A. 197); *Id.* at 85.

to achieve the highest possible minority population in the Eleventh District. *Id.* at 73-74. The Eleventh Districts in the Lewis-Gingrich Plan and the Abrams C Plan are essentially the same. *Id.* at 78.

Appellants try to cover up the fact that each plan maintains the Second District as a viable minority district based on total population adjusted by deletion of non-voting military population.[23] That is accomplished principally by the racial division of urban Muscogee County to include large black urban population concentrations, to exclude large white urban populations, and to incorporate a large non-voting, predominantly white military population at Ft. Benning, which increases the district's effective black population by 2-3%. In contrast, the Court Plan returns Muscogee County and Columbus to its historical role as the core of the Third District. It also reunites Bibb County and returns Macon to its traditional role as the core of the Eighth District.

SUMMARY OF ARGUMENT

In *Shaw v. Reno*,[24] *Miller v. Johnson*, and their growing progeny, this Court has made clear the Fourteenth Amendment will not permit the computer-driven ghettoization of black citizens into their "own" districts as a way to enhance racial diversity within the halls of government. The adverse side effects are just too great, both for our society and our Constitution.

The position of the parties in this case illustrate their very different perceptions of what *Miller v. Johnson*, 115 S.Ct. 2475, stands for. Appellants hear only a slight reprimand over the most bizarre gerrymanders generated

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[23] *See supra* note 17. Even unadjusted population figures make the Second a majority-minority district or close to it in each alternate plan offered by the ACLU: Abrams A (54.45%); Abrams C (49.80%); ACLU-LA (49.75%); Lewis-Gingrich (49.41%).

[24] 509 U.S. 630 (1993).

by the well documented DOJ maximization agenda. They still employ Section 2 as a kind of racial geiger counter. They scan precincts, cities, and counties for minority populations and then, in a circular logic essential to the maximization theory, use the location of multiple minority population centers to define a congressional district's boundary lines, no matter how distant or different those pockets of minority population are.

This case reflects only a slight change in the DOJ's approach to the Voting Rights Act. The DOJ now understands that condensing disparate concentrations of minority population clusters into something it can label a "compact naturally occurring minority population large enough to comprise a majority in a proposed district" needs to less obviously subordinate a state's traditional districting principles to the goal of maximization post-*Miller*. However, a "less bizarre" district cannot avoid strict scrutiny where the racial purpose has not changed. Race based districting always requires strict scrutiny under the teachings of *Shaw* and *Miller*, unless traditional districting principles are observed.

The serious inroads Section 5 makes into a state's sovereignty, even when the statute is properly applied, cannot be overlooked. *Cf. Miller*, 115 S.Ct. at 2493. Therefore, the fact the State agrees with the district court's identification and implementation of Georgia's traditional districting principles is an important point in this case. A state's sovereignty, particularly with respect to its internal political affairs, is a cornerstone of the federalist form of democratic government. The fact the sovereign is a jurisdiction covered under the VRA should only heighten rather than dilute judicial awareness of the real potential for violation of the principles upon which our democracy depends. As recently stated in *Bush v. Vera*, —— U.S. ——, 116 S.Ct. 1941, 1960-61 (1996):

> we adhere to our longstanding recognition of the importance in our federal system of each state's sovereign interest in implementing its redistricting plan.

The real harm caused by the DOJ's six-year effort to dictate how this congressional plan must be drawn is to Georgia's sovereign right to redistrict itself. Appellants will say the state abdicated its right to draw the plan. The real truth is that, as long as the Section 5 review process remains as subjective and biased as what Georgia, North Carolina, Louisiana and Texas have experienced, states will not even try to run the preclearance gauntlet in the future. If a federal court is told it too did not "get it right," what hope is there for a legislature with hundreds of members who must balance an even more complex blend of factors than did this three judge court?

This appeal is really nothing more than the DOJ's reassertion of its Section 5 review powers over Georgia's congressional districting process through an overly expansive and improper reading of Section 5. *See, e.g., Georgia v. Reno*, 881 F.3d 7, 12-14 (D.D.C. 1995). Section 5 was intended to permit a limited, straightforward, objective analysis that compared a past practice (or plan) with the new. The DOJ's unilateral assimilation of Section 2 into the Section 5 preclearance process [25] allows the DOJ's maximization demands to proceed under the pretense of a "retrogression objection." *Shaw* and *Miller* should have ended the DOJ's efforts to compress these two sections into a generalized authority to maximize minority districts. As this appeal evidences, the DOJ has not yet accepted the judgment of this Court.

The district court's finding that the VRA did not oblige it to create a second minority district was not clearly erroneous. The Court Plan on appeal is a carefully drawn remedy for the rampant racial gerrymandering that directly impacted eight of Georgia's eleven districts. The Court Plan capably finds the symmetry between remediation of unconstitutional racial gerrymandering and the reinvigoration of the State's redistricting principles, so to

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[25] *See* 28 C.F.R. § 51.55(b)(2).

undo the DOJ's mischief without violating the true purposes of the Voting Rights Act or infringing upon state sovereignty.

The reformed Second and Eleventh (now Fourth) Districts, while majority white, are still distinctly multi-racial. Both African-American incumbents won primary elections in 1996 with comfortable margins of victory over multiple white challengers. The worst thing that could happen now would be for this Court to sanction the DOJ's continued efforts to micromanage Georgia politics via a *de facto* Section 5 review of a court drawn remedial plan, and deny Georgia a well deserved end to this litigation before the new millennium is upon us and the reapportionment process must start anew.

ARGUMENT

I. THE DISTRICT COURT'S ORDER IS NOT CLEARLY ERRONEOUS

Appellants argue that a proper remedy must retain the Eleventh District as a minority district. The district court disagreed, because the facts did not establish the three *Gingles* factors that would obligate a court to consider whether remedial action under Section 2 was warranted under the "totality of the circumstances." *See Johnson v. DeGrandy*, —— U.S. ——, 114 S.Ct. 2647 (1994).

The district court's Section 2 findings are reviewed under the clearly erroneous rule, a deferential standard of review that recognizes the unique ability of a local tribunal to determine the inextricably intertwined factual and legal questions upon which these issues turn. *See Fed. R. Civ. P.* 52(a).[26] The clearly erroneous rule has been

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[26] The quantum of deference due a district court's findings under the clearly erroneous standard is well settled. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that

specifically extended to include ultimate findings of fact in voting rights cases. *See Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982) (trial court's findings due "great deference"). As stated in *Thornburg v. Gingles*, 478 U.S. 30 (1986):

> [O]ur several precedents . . . have treated the ultimate finding of vote dilution as a question of fact subject to the clearly erroneous standard of Rule 52(a). *See, e.g., Rogers v. Lodge*, 458 U.S. at 622-627; *City of Rome v. United States*, 446 U.S. 156, 183 (1980); *White v. Regester*, 412 U.S. at 765, 770.[27]

Id. at 78. *White v. Regester*, 412 U.S. 755, 769-770 (1973), employed a similar analysis:

> [W]e are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the . . . district in the light of past and present reality, political and otherwise.

A district court's assessment of the "totality of circumstances" pertinent to a proper remedy must be given great weight.[28] That deferential standard of review should not

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their function is not to decide factual issues de novo." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). A finding is only clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).

[27] Elsewhere in *Gingles*, 478 U.S. at 79, this Court provided its rationale for the application of Rule 52(a) to ultimate findings in vote dilution cases:

> [T]he application of the clearly erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law.

[28] In discussing how best to fashion an appropriate remedy for a VRA violation, this Court observed:

change when the remedy is constitutional in scope. Here, the district court brought to bear not only local knowledge, but its considerable experience with this specific case.[29] This is apparent from the three opinions it has produced to date. That experience was an indispensable ingredient in the sound judicial determination that Georgia's traditional districting principles were subordinated to racial considerations in creating the Eleventh and Second districts. This Court upheld that determination in *Miller*, 115 S.Ct. at 2494. There is no reason to suggest the district court would now misjudge those same issues in crafting a remedy properly balancing Georgia's traditional districting principles with the often competing goals of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment.

The same deferential standard of review should logically apply to a court's findings as to the subissues involved in devising a remedial plan. The good faith of a legislature in the electoral districting process is a presumption that is not easily rebutted. *See Miller*, 115 S.Ct. at 2488 (relying on *Regents of the Univ. of Ca. v. Bakke*, 438 U.S. 265, 318-319 (1978) (opinion of Powell, J.)). That presumption should be even stronger when the demographer is a three judge court charged with impartiality and a remedial purpose. The Court's calculus as to a *de*

> [S]ince the district court is more familiar with the nuances of the local situation than are we, and has heard the evidence . . . , we think the question of the appropriate remedy is for that court to determine, in the first instance, after hearing the views of both parties.

Perkins v. Matthews, 400 U.S. 379, 397 (1971); *accord*, *Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982).

[29] Justice Black stated the premise well:

> Above all else, we should remember that no one of us is a resident of Mississippi or the Judicial Circuit of which Mississippi is a part. The judges who entered this order do reside in that Circuit, they heard the evidence and oral arguments, and examined the statistics.

Connor v. Johnson, 402 U.S. 690, 694 (1971) (Black, J., dissenting).

mimimis population deviation is inextricably intertwined with its choices as to how best to remedy the widespread constitutional infirmities in the existing congressional plan. The rationale for deference to the fact-finder on these issues is the same: district courts possess first-hand familiarity with the evidence as well as the local knowledge and experience that are determinative of these issues. *See, e.g., Wright v. Rockefeller*, 376 U.S. 52 (1964).

A. The District Court Afforded Appellants A Full Opportunity To Present Evidence As To A Proper Remedy.

ACLU Appellants contend the clearly erroneous rule should not apply because of an "inadequately developed record" on the Section 2 issue. ACLU Brief, 45. This argument ignores the fact they were provided a full opportunity to develop a record on the question of whether Section 2 required a second or third minority district at the remedy hearing.

With respect to the hearing on the Second District, the ACLU Appellants complain that the state offered no witnesses,[30] but ignore the fact the DOJ conceded liability. The bottom line, once again, is that the ACLU was afforded a full opportunity during the remedy hearing to present any evidence it desired as to both districts.[31]

The ACLU Appellants' participation in the evidentiary hearing afforded them the same opportunity as other litigants to present evidence as to any compelling state interests that would warrant perpetuation of the Eleventh or Second as minority districts. Because all parties were

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[30] This allegation is incorrect. The state offered the testimony of legislators John White, Calvin Smyre and Congressman Sanford Bishop via deposition. Moreover, the DOJ opted to call Bishop as a witness, and he did testify in defense of the district (R.Tr. 93-155).

[31] The ACLU Appellants did offer an expert witness, Selwyn Carter, to testify in support of the ACLU's position and advance its various alternative plans. R.Tr. 294-347.

afforded a full opportunity to present evidence and argument on the obligations the VRA imposed on the remedial plan, the ACLU Appellants cannot avoid application of the clearly erroneous rule.

The other procedural stratagem employed by the ACLU to avoid this deferential standard of review is to contend the remedy hearing should have taken place *after* the court plan was announced. ACLU Brief, 44-45. The ACLU incorrectly cites *SRAC v. Theodore*, —— U.S. ——, 113 S.Ct. 2954 (1993), for this proposition. That brief order vacated and remanded *Burton v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992).[32] The district court had conducted a remedy hearing and received numerous alternative plans. In its order, it stated it did not have the time, due to the imminence of election dates, to conduct a full Section 2 analysis of all the alternative plans offered at the remedy hearing.[33] However, because these interim court plans had the potential to be in place for the remainder of the decade, the Solicitor General argued, as an Amicus, that the district court must conduct a full Section 2 analysis. This Court remanded, citing the Solicitor General's brief. *Theodore*, 113 S.Ct. at 2954.

The Solicitor General did not contend a remedy hearing must take place *after* a court plan is devised.[34] Such

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[32] *Burton* involved implementation of two court plans for South Carolina's bicameral legislature after the gubernatorial veto of the legislatively passed plans. *See* 793 F. Supp. 1329.

[33] *Burton*, 793 F. Supp. at 1352. The 1992 elections were in fact held using these court drawn plans.

[34] Appellant ACLU also cites *Edge v. Sumter County School Dist.*, 775 F.2d 1509 (11th Cir. 1985), for the proposition that a court must insure its remedial plan comply with Section 2. That court observed that "[a] hearing must be held to permit the parties to submit evidence on Section 2 issues." *Id.* at 1510. It did not say that hearing must take place after publication of the court's plan. Moreover, the *Edge* court was speaking about the remedy of a VRA violation. Here, the remedy is needed because the district court, as affirmed by this Court, found Section 2 did

a rule would be problematic, since it would potentially deny the court the benefit of alternative plans and evidentiary presentations on the *Gingles* factors before it prepares its plan. Forcing a court to create a plan out of thin air would reduce judicial efficiency and would be inconsistent with the evidentiary requirements of Rule 52. Moreover, unlike the *Burton* court, this district court did conduct a full Section 2 analysis following an evidentiary hearing. Its order articulates its reasons for not including a second minority district in the Court Plan and provides Appellants a complete record on which to prosecute their appeal.[35] Therefore, the clearly erroneous rule should govern this Court's review of the judgment below.

II. THE DISTRICT COURT PROPERLY EXERCISED ITS EQUITABLE POWERS TO REMEDY RACIAL DISCRIMINATION.

The scope of a court of equity's discretion in fashioning a remedy for a constitutional wrong as virulent as the electoral partitioning of the races is a defining issue in this case. As stated in *Connor v. Finch*, 431 U.S. 407, 414 (1977):

> The essential question here is whether the district court properly exercised its equitable discretion in reconciling the requirements of the constitution with the goals of state policy.

A federal court's broad equitable powers to remedy racial discrimination tend to defy bright line definition.[36] "The

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not compel the majority minority status of the Eleventh District. Therefore, a hearing to insure the "Section 2 violation" is fully remedied would be nonsensical in a case where remedy is needed because the VRA has been misapplied in violation of the Fourteenth Amendment.

[35] A central contention in the Solicitor's brief was that the *Burton* court's plans were not amenable to appellate review without a full Section 2 analysis conducted by the court below. *See SRAC v. Theodore*, Case No. 92-155 (S.Ct.), Brief of the Solicitor General.

[36] "[I]n seeking to define the scope of [a court's] remedial power . . . in an area as sensitive [as racial discrimination], words are

scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *United States v. Paradise*, 480 U.S. 149, 183-184 (1987). The *Paradise* court went on to note, in a non-redistricting context, that the Court does *not* require plans remedying racial discrimination "be limited to the least restrictive means of implementation." *Id.*

In *Freeman v. Pitts*, 503 U.S. 467 (1992), the Court underscored the broad discretion a court possesses in dealing with racial discrimination:

> The essence of a Court's equity power lies in its inherent capacity to adjust remedies in a feasible and practical way *to eliminate the condition* [37] or redress the injuries caused by unlawful action. Equitable remedies must be flexible . . . . The task is to correct, by a balancing of the individual and collective interest, the condition that offends the Constitution.

Id. at 488 (emphasis added).

In a variety of anti-discrimination contexts, this Court has recognized that a district court's remedial powers extend beyond elimination of the actual mechanism of dis-

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poor instruments to convey the sense of basic fairness inherent in equity." *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 31 (1971). The *Swann* court, citing *Green v. County School Board*, 391 U.S. 480 (1968), went on to offer "workable," "effective," "feasible" and "realistic" as broad defining concepts of a court's equity arsenal when racial discrimination is the wrong to be remedied. *Id.*

[37] Perhaps the most straightforward description of the correct remedy for racial discrimination by a government is Justice Black's order in *United States v. Edgar*, 404 U.S. 1206, 1207 (1971), where the Justice stated that the Fourteenth Amendment mandated "racial discrimination . . . be eliminated *root and branch*." (emphasis added). *Accord, Wright v. Rockefeller*, 376 U.S. at 62 ("uproot all vestiges") (Douglas, J., dissenting).

crimination when a broader remedy is necessary.[38] In the case of voting rights violations, Congress has squarely stated that a district court must "exercise its traditional equitable powers so that it completely remedies the prior dilution . . . ." S. Rep. No. 417, 97th Cong., 2d Sess. 31 (1982).

The case of *Milliken v. Bradley*, 418 U.S. 717 (1973), provides good insight into the broad remedial discretion vested in a lower court in cases involving race based districting.

> [A]n interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances, *an interdistrict remedy would be appropriate* to eliminate the interdistrict segregation directly caused by the constitutional violation.

Id. at 745 (emphasis added).[39]

In this case, the court's obligation to eradicate racial discrimination must be reconciled with the fact that redistricting is normally a legislative task. *Miller*, 115 S.Ct. at 2488; *Chapman v. Meier*, 420 U.S. 1 (1975). When a court acts in the legislature's stead, judicial restraint is called for out of respect for our tripartite form of government and the separation of powers doctrine that maintains the balance of powers between the three branches. *See Upham v. Seamon*, 456 U.S. 37, 41 (1981) (per curiam). However, when a state's legislative will has been

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[38] *See, e.g., Green v. County School Bd.*, 391 U.S. 430, 438 (1968); *Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1968).

[39] Following the logic of *Milliken*, an interdistrict remedy was warranted here due to the twin forces of "packing" and "bleaching" which resulted in two new saturated minority districts and a number of artificially bleached white districts which share boundaries with the two gerrymandered districts.

overcome by the federal executive and its redistricting process infected with racial discrimination in violation of the Fourteenth Amendment, a court of equity cannot be so tightly tethered by the traditional deference due a legislature. After all, the real victim here is the Georgia legislature. It would be a sad irony indeed for the federal judiciary to fail to afford a full remedy out of deference to a legislative will this Court found to have been subverted.

The district court's constitutional and equitable obligation was to fashion a remedy that eradicated the racial classifications that drove the 1992 congressional plan.[40] If the district lines that caused such wholesale segregation are not completely remedied, the contours of the unconstitutional plan will dictate the configuration of Georgia's congressional districts indefinitely.[41] Appellants attempt to transform *Upham v. Seamon* from precedent designed to protect the sovereignty of a state legislature into a neutralizing agent that dilutes the power of a federal court of equity to provide a full remedy. "Minimal disruption" becomes a guise for preserving the essence of each racially gerrymandered district.[42]

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[40] "The [1992] districting plan overstepped the requirements for section 5 compliance because it was designed to secure proportional representation for black voters in Georgia, not adhere to the VRA." *Johnson I*, 864 F. Supp. at 1385.

[41] The Section 5 retrogression principle institutionalizes the racial choices made by political subdivisions and precleared by the DOJ. To effectuate less than a full remedy insures the racial identities of these gerrymandered districts will become permanent features of the State's congressional plan. *See Johnson III*, 922 F. Supp. at 1567 n.16.

[42] Appellants' determination to override Georgia's will for a second time seems to be fueled more by outdated stereotypical notions about the South, Georgia in particular, that have convinced Appellants that this State is perpetually committed to the disenfranchisement of its minority citizens than by the evidence. While our nation's history of past discrimination supports a healthy skepticism with respect to any change to a voting practice or

When racial discrimination in the context of redistricting is the constitutional wrong to be remedied, a court drawn plan will inevitably impact both the adjudicated districts and their neighbors. Such an impact does not violate *Upham*. Gerrymandering is a function of racial inclusion *and exclusion*. The district court's task involved restoration of the natural and historical cores of all Georgia's district's as well as the return of numerous counties to their rightful economic interest groups.[43] This approach to remedy restored the *functional* districts Georgia had in 1982 without violating the Fourteenth Amendment, the VRA or Georgia's volitional policy choices and traditional districting principles.

For Appellants, there seems to be no cushion between remedial race based districting mandated by the VRA, and race based districting that violates the rights of all citizens under the Equal Protection Clause of the Fourteenth Amendment. If a legislature violates the Fourteenth Amendment by using race to excess, the Appellants' reading of the VRA means the "remedy" must retain the absolute maximum quantum of race-based districting that can be employed without violating the Fourteenth Amendment. It contorts the narrow holding in *Upham v. Seamon*, 456 U.S. 37, prohibiting the judicial revision of constitutional districts that are not necessarily impacted by the "ripple effect" of the remedy, into a bad rule of law that would deny a court of equity the necessary powers to remedy interdistrict race discrimination.

Because it is so often overlooked, it is important to point out the remedy ordered in this case benefits both races. The Court Plan lessens the racial stereotyping that

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procedure by a legislature, it does not justify the Appellants' thinly veiled accusation that a three judge court has discriminated.

[43] The court found Georgia's districts outside the metro Atlanta area had economic communities of interest that provided much of the rationale for their location. *See Johnson III*, 922 F. Supp. at 1565.

is both the instigator and consequence of racially identifiable districts that are not required to remedy past discrimination currently denying minority citizens rights guaranteed them under the Voting Rights Act.

The Appellants' perception is that the political future of minorities has been diminished rather than energized by the Court Plan. This misperception is a direct product of the misguided "group rights" approach they have taken to redistricting. *See e.g., Whitcomb v. Chavis*, 403 U.S. 124 (1974). They measure equality by proportional representation based on the mere color rather than character of the represenative. *Compare Johnson v. Miller*, 929 F. Supp. at 1555; *Mortham*, 926 F. Supp. at 1475.

We have seen the "group rights" approach [44] surface as recently as *Shaw v. Hunt*, —— U.S. ——, 116 S.Ct. 1894, 1906 (1996). It was rejected. Appellants simply do not acknowledge the benefits of multi-racial constitutional districts unless the minority is the majority. Instead, they subordinate real communities of interest to computerized replications only expert demographers understand. *See Johnson v. Miller*, 929 F. Supp. at 1547-48; *Johnson III*, 922 F. Supp. at 1562-65; *Miller*, 115 S.Ct. at 2484, 2490; *Burton*, 793 F. Supp. at 1357. The DOJ and ACLU see only this concocted "virtual reality." In so doing, they assume the very racial stereotyping they allegedly seek to prevent. *See Miller*, 115 S.Ct. at 2486-87; *Missouri v. Jenkins*, —— U.S. ——, 115 S.Ct. 2038, 2064 (Thomas J., concurring) (1995); *Mortham*, 926 F. Supp. at 1493.

No doubt there was a time when racial prejudice was so monolithic that a group rights approach was a necessary but pragmatic evil essential to any progress towards

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[44] See Katherine Butler, Affirmative Racial Gerrymandering: Fair Representation for Minorities or A Dangerous Recognition of Group Rights, 26 *Rutgers L.J.* 595 (1995) for a discussion of how the group rights approach to enforcement of the Voting Rights Act has instigated the kind of racial gerrymandering at issue in this case.

breaking down the barriers to opportunity, political or otherwise. A lot of time has passed. The law need not proceed on the premise that a group-based remedy is necessary or appropriate to alleviate past wrongs in our society. *See, e.g., Freeman v. Pitts*, 503 U.S. at 495-96. *Shaw* and *Miller* are now the law of our land. This case presents yet another watershed in the inexorable progress we must make if the aspirations of Voting Rights Act are to be mirrored by the volitional electoral behavior of our nation.

III. SECTION 2 DOES NOT MANDATE RETENTION OF THE ELEVENTH AS A MINORITY DISTRICT.

Despite *Miller v. Johnson*, 115 S.Ct. 2475, the DOJ continues to assert that the VRA requires the district court create another minority district. This Court's decisions make clear that race-based remedies will not be undertaken simply because the DOJ urges it:

> Our presumptive skepticism of all racial classifications . . . prohibits us . . . from accepting on its face the [DOJ's] conclusion that racial districting is necessary under the [VRA]."

Miller, 115 S.Ct. at 2491.[45]

"[F]ederal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law." *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993). *See also Growe v. Emison*, 507 U.S. 25, 40-41 (1993). Justice O'Connor stated the reason for this limi-

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[45] *See also Adarand Constructors, Inc. v. Pena*, —— U.S. ——, 115 S.Ct. 2097, 2110-11 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 491-93 (1989); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986). This conclusion is also compelled by the fact the DOJ's interpretation of the VRA is not entitled any deference. *Miller*, 115 S.Ct. at 2491. In fact, given the litany of cases finding the DOJ to have totally misinterpreted the VRA, its interpretation must be viewed with considerable skepticism, if not open suspicion.

tation in *Missouri v. Jenkins*, 115 S.Ct. at 2061 (O'Connor, J., concurring) (citations omitted):

> Courts . . . are different. The necessary restrictions on our jurisdiction and authority contained in Article III of the Constitution limit the judiciary's institutional capacity to prescribe palliatives for societal ills. The unfortunate fact of racial imbalance and bias in our society, however pervasive or invidious, does not admit of judicial intervention absent a constitutional violation . . . . Unlike Congress, which enjoys " 'discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' " federal courts have no comparable license and must always observe their limited judicial role.

A state, however, may adopt a minority voting district without finding a violation of statutory or constitutional law where it comports with its traditional districting principles and does not violate *Miller*. *See Voinovich*, 507 U.S. at 155. The district court, in fact, considered the issue to be one the legislature should resolve. The court made it clear that policy decisions about the intentional creation of a second minority district must be left to the legislature since the court perceived no statutory or constitutional obligation to create one.[46]

Appellants do not attempt to escape the conclusion that each of their "alternative" configurations for the Eleventh District are predominantly based on race and must withstand the strict scrutiny test. Instead, they contend the results test of § 2(b) of the VRA provides the necessary compelling state interest.

The results test of the VRA is violated only if, "based on the totality of circumstances, it is shown that the

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[46] "We do no harm with this plan, which cures the unconstitutionality of the former and can serve in 'caretaker' status until the legislature convenes to change it." *Johnson III*, 922 F. Supp. at 1569.

political processes leading to nomination or election in the State . . . are not equally open to participation by members of [*e.g.*, a racial minority] . . . ." 42 U.S.C. § 1973(b).[47] Appellants have no adverse "results" from these remedial districts (or the former unconstitutional districts) which would suggest a discriminatory effect. The district court's findings in *Johnson I* respecting the absence of legally significant racially polarized voting in the Eleventh District are *res judicata* in this case, since Appellants relied exclusively on the Eleventh District trial record, offering no additional evidence on this issue at the remedy hearing.

A court must possess the equitable discretion to cure a districting plan of racial discrimination by restoring it to a configuration that adheres to traditional districting principles. Such a remedy cannot violate Section 2. This common sense approach to a practical reconciliation of the Fourteenth Amendment and the VRA, so to ease the tension between them, logically applies with even greater force to courts that perform this legislative task. "[F]undamental concerns of federalism mandate that states [and presumably courts acting in their stead] be given some leeway so they are not 'trapped between competing hazards of liability.'" *Bush v. Vera*, 116 S.Ct. at 1969 (O'Connor, J., concurring) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. at 291 (O'Connor, J., concurring)).

Following the remand in *Miller v. Johnson*, the district court appropriately deferred to the legislature's obligation to fashion a remedial plan. However, that legislative special session deadlocked on the issue.[48] There simply

[47] The constitutionality of § 2(b) has never been addressed by this Court. *See generally Bush v. Vera*, 116 S.Ct. 1941.

[48] In virtually every post 1990 redistricting plan where racial gerrymandering was found to exist, Republican legislators supported black maximization plans, believing it was in their political interest. *See e.g.*, the Lewis-Gingrich Plan; testimony of Donald

was no "strong basis in evidence" that Section 2 required the creation of another minority district. Both the legislature and the district court correctly concluded that an affirmative effort to retain the Eleventh District by replacing Savannah's black population with Macon's, while deleting racial appendages in Twiggs, Wilkes and Richmond counties and intensifying the gerrymander of DeKalb, would be contrary, even contemptuous,[49] of this Court's opinion in *Miller*.

The district court was not free to explore new ways to create minority districts. *See Shaw v. Hunt*, 116 S.Ct. at 1906. Section 2 was designed to remedy proven vote dilution, not to probe potential new sites for minority districts. "Section 2 of the Voting Rights Act . . . is not some all-purpose weapon for well-intentioned judges to wield as they please in the battle against discrimination." *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

The district court's approach is well within the "leeway" Justice O'Connor spoke of in *Wygant* and again in *Bush v. Vera*. It would undermine public confidence in

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Hill, *supra* at p. 12. The Republican/Black Caucus coalition in Georgia, while not large enough to pass a plan, was able to block any redistricting plan that did not contain two minority districts. *See generally, Johnson v. Mortham*, 926 F. Supp. at 1489-90; Kevin A. Hill, Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States, 57 *J. Pol.* 384, 388, table 1 (1995). Hill concluded racial gerrymandering accounted for Republican victories in 1992 in Georgia's First, Third and Fourth Districts, *id.* at 397-98, and correctly predicted Republican victories in Eighth and Tenth Districts in 1994. With the party change of the Ninth District representative, the political subdivision of the delegation now mirrors its racial composition: eight white Republicans and three black Democrats. *See* Juliana Greenwald, Deals Switch to GOP, 53 *Cong. Q. Wkly. Rep.* 1084 (1995).

[49] As stated by the district court, "Georgians deserve a better fate." *Johnson III*, 922 F. Supp. at 1567.

the sovereignty of their state legislature (or a local district court acting on its behalf) to see yet another congressional plan be invalidated. The "leeway" between what is mandated by the Section 2(b) of the VRA, and the unconstitutional predominance of race under the false flag of enhancing minority voting strength must include a reasonable margin of deference to the local legislature/tribunal that draws the plan. Much of the work does, after all, boil down to reasoned judgment calls. It is impeartive that this Court not be drawn into the DOJ's efforts to create as many minority districts as possible in covered jurisdictions by narrowing that "leeway" to the proverbial eye of a needle.

We now possess important new facts which were not known to the district court, but vindicate its vision of a fair and constitutional remedial plan. The 1996 primary elections which govern the nomination process in the Fourth (the unconstitutionally gerrymandered Eleventh's counterpart) and Second District are over. In the Fourth (36.6% minority), African-American incumbent Cynthia McKinney easily defeated three white challengers, garnering 67.47% of the vote, and won outright the Democratic nomination. In the Second (39.21% minority), Sanford Bishop (African-American) defeated two white challengers, getting 59.39% of the vote, and also won outright the Democratic nomination in his district.[50] These electoral results are contrary to the Appellants' contention that racial bloc voting by white voters always denies minority candidates equal access to the electoral processes of nomination for or election to public office, unless they are a majority in the district. *See* DOJ Brief, 29.[51]

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[50] The Court can take judicial notice of these election results. Fed. R. Evid. 201 (facts are not subject to reasonable dispute and capable of "accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). *See generally Corbin v. Cannon*, 838 F. Supp. 561, 562 (M.D. Fla. 1993) (election date of sheriff subject to judicial notice).

[51] In 1996, all three minority candidates won their party's nomination. Representative Lewis was unopposed either in the primary

Just how the Court Plan, which Appellants admit was not purposefully designed to discriminate, denies minority voters equal opportunity to nominate or elect their candidates of choice is not readily apparent. There was no preexisting district where black candidates lost bids for nomination or election. There is no past track record to judge the "effects" of a preexisting district's lines. The two gerrymandered minority districts elected their minority incumbents by landslides in the last two election cycles. Both districts were proven to be overly safe, containing minority populations that did not just offer equal opportunity—they provided a virtual guarantee of victory. Even asuming the VRA sanctioned the creation of minority districts in these locations, these were not narrowly tailored under the strict scrutiny test. *See e.g., Johnson I*, 864 F. Supp. at 1392.

Section 2(b) requires we rely on the actual "results" of elections, rather than predictions. Section 2(b) will also provide a remedy if it is shown that minority candidates in these remedial districts are subsequently denied equal access to the political process because of their race, as opposed to political party affiliation, campaign issues, past performance as an incumbent or other legitimate nonracial reasons for an adverse electoral outcome.[52] Minority candidate success in the Second and Fourth Districts underscores the wisdom of waiting for the "results," before assuming a district will discriminate and imposing a racially safe alternative district that, in this case, would have denied the state a golden opportunity to prove minority candidates can win in majority white districts.

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or general election. To date, minority candidates have had a 100% success rate under the Court Plan. While this is no guarantee of future success, it does signal caution before a court mandates the artificial creation of minority districts based on hypothetical designs that perpetuate race as the dominant design feature.

[52] *See e.g., Johnson v. Mortham*, 926 F.Supp. at 1479, 1490 (obligation to assess political party affiliation and other evidence as alternative explanation for racial rationale for voting patterns).

Appellants will predictably argue two points in reply: (1) the electoral success of these incumbents is not probative of the absence of racial bloc voting generally in Georgia; and (2) the fact they were successful and well regarded incumbents from preexisting minority districts gave white voters a reason to vote for them. Neither of these putative explanations effectively rebut the Appellees' argument. First, the issue of racially polarized voting must be determined after an intensely local appraisal of the voting patterns in the district in question. *See Thornburg v. Gingles*, 478 U.S. 30; *Shaw v. Hunt*, 116 S.Ct. at 1906. It is not a statewide inquiry. *See id.* The most current evidence we have to date as to whether racial bloc voting is denying minority candidates equal access to the political process is the primary elections in each of the court drawn districts where minority candidates won. Those elections contribute another common sense reason to expand the "leeway" that this court should give to a legislative or court plan that is remedial of a racially motivated districting scheme, just as this court affords "leeway" in the form of judicial deference to a districting plan that is remedial of a proven section 2 violation.

A. The ACLU's Expert Did Not Support The Contention That Section 2 Required Two Majority Minority Districts.

The next issue is the evidence offered to prove Section 2 mandated one or both of the unconstitutional minority districts, as modified in the Appellants' alternative plans. At the evidentiary hearing on remedy, Appellants' key witness was Selwyn Carter. He testified as an expert "in the field of demography and redistricting and in assessing plans drafted by others for . . . compliance with the Voting Rights Act." (R.Tr.295).[88]

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[88] Mr. Carter is the Director of Voting Rights Programs for the Southern Regional Council. He represented the Black Caucus in the Georgia General Assembly during the 1995 Special Session.

Carter either prepared or supervised the preparation of every ACLU sponsored alternative plan. (R.Tr. 297-298).[54] Their common feature was retention of majority minority status for the two unconstitutional districts. Carter was asked repeatedly whether he believed such a configuration of the Eleventh District was mandated by the Voting Rights Act.[55] He never answered this question in the affirmative. The best he could offer was to plead uncertainty:

> Question: . . . [I]s there . . . a single plan [offered by the] ACLU, black caucus or your organization that you can say under oath is required by the Voting Rights Act in terms of a second majority minority district?
>
> Carter: I believe that we are in a gray area of the law.

(R.Tr.332).[56] Carter further admitted that the ACLU's plans were based on a subjective sense of "racial fairness" rather than the requirements of the VRA. R.Tr. 332-3 (testimony quoted in Appellees' Motion to Affirm at 22).

B. The Appellants Offered No Evidence Of Racially Polarized Voting At The Remedy Hearing.

The record from the remedy hearing is similarly devoid of any analysis of voting patterns. In its brief on remedy, the DOJ stated it had retained an expert to assess whether the alternative plans presented to the district court complied wih the VRA. DOJ Brief on Remedy (R. 348).

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[54] As noted *supra*, Abrams Plan C was actually prepared by the Republican Party demographer Donald Hill.

[55] See questions posed at R.Tr. 324, 326, 330, 332.

[56] Carter acknowledged there were still clear cases wherein a minority district would be required by the Voting Rights Act (R.Tr. 333). Obviously, this was not one of them. Carter was also unable to testify regarding any community of interest that would serve as a foundation for the race-based configuration of the Eleventh District advocated by Appellants. (R.Tr. 338).

"For this reason, all of the [DOJ's] observations . . . concerning [VRA] compliance *are preliminary and subject to reassessment based on . . . the expert's analysis.*" *Id.* at n.6 (emphasis added). No such testimony was ever offered. It is on this hollow evidentiary record that Appellants contend a second minority district was "mandated" by Section 2.

The expert witness Appellants rely upon is Dr. Alan Lichtman. He testified for the DOJ in the original trial regarding the constitutionality of the Eleventh District.[57] In that case, the district court concluded that the "record failed to demonstrate . . . chronic bloc voting . . . ." *Johnson I*, 864 F. Supp. at 1392.[58] It further elaborated on this finding in *Johnson III*, 922 F Supp. at 1567:

> Statistical evidence . . . showed a significant degree of crossover voting. *Johnson I*, 864 F. Supp. at 1390. We observed that "black and black-preferred candidates in Georgia have achieved many electoral victories . . . and have received significant—occasionally overwhelming—support from both black and white voters within the Eleventh Congressional District." *Id.* at 1390-91. During the Second District trial, Linda Meggers stated that election results in that district indicated white crossover voting. [R.Tr. 438.] Indeed, Congressman Sanford Bishop . . . agreed. *Id.* at 142. [W]hile some degree of polarization exists, it is "not in alarming quantities."

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[57] The district court, in large part, rejected his testimony. *See Johnson I*, 864 F. Supp. at 1388 (he was "trounced" by the State's expert Dr. Katz); *id.* at 1891 (Katz was "largely successful" in undermining the testimony of . . . Dr. Lichtman).

[58] The district court noted black candidates in the 1992 Eleventh District Democratic primary received 55% of the white vote. *Id.* at 1391. In the runoff election for the nomination, McKinney won against a white candidate with 56% of the vote and with 23% of the white vote. *Id.* As to the Second District, Rep. Bishop admitted in his testimony he received substantial white voter support. *See Johnson III*, 922 F. Supp. at 1567.

> *Johnson I*, 864 F. Supp. at 1390. The second and third *Gingles* preconditions . . . would not be met in a Section 2 challenge to the remedy.

Johnson I was affirmed by this Court, and *Johnson II* was not appealed. These findings are therefore *res judicata* in this case.

Dr. Lichtman's work has been discredited in this area of the law. The three judge court in *Johnson v. Mortham* noted serious methodological errors in his work, all of which are present in the report and testimony he offered in this case:

> We reject Dr. Lichtman's results because of several critical methodological errors . . . . First and foremost, Dr. Lichtman only examined black versus white elections, excluding all black versus black and white versus white elections, even though there was . . . extensive . . . testimony that the African-American community had a clear candidate of choice in such elections.

926 F. Supp. at 1474. Dr. Lichtman made the same mistake in his Georgia report. For example, he excluded the multiple elections of Wyche Fowler, a white candidate who represented the Fifth District following Andrew Young, even though Fowler was clearly the African American community's candidate of choice. He also excluded from consideration the multiple elections of African-American Congressman John Lewis, even when he defeated white challengers. The *Mortham* court specifically noted Dr. Lichtman's biased disregard of "highly relevant" congressional elections as a basis for their rejection of his findings. *Id.* at 1475.[59]

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[59] Other courts have rejected Dr. Lichtman's results because of the bias he shows in selecting elections for inclusion in his report. *See, e.g., SCLC v. Sessions*, 56 F.3d 1282, 1293 (11th Cir. 1995). The *Mortham* court also discredited Dr. Lichtman's findings because he failed to account for the obvious impact party affiliation had on voting patterns. *Mortham*, 926 F. Supp. at 1475.

A final reason given by the *Mortham* court for rejection of Dr. Lichtman's analysis was his inclusion of counties that were not in the congressional district he was analyzing. *Mortham*, 926 F. Supp. at 1478, n.33. The same problem exists with the DOJ's use of Dr. Lichtman's 1994 trial testimony as the evidentiary predicate for their contention that racial bloc voting requires a Section 2 remedy in the Eleventh District, as proposed by the DOJ's Illustrative Plan. That district contains a very different configuration of counties and cities than the original Eleventh District.[60] *Shaw v. Hunt* makes clear that a state cannot provide á Section 2 remedy in a location different from where the alleged Section 2 violation occurred.[61] This record is devoid of a polarized voting analysis that would be applicable to counties that comprise the DOJ's proposed Eleventh District.[62]

IV. THE COURT PLAN IS NOT RETROGRESSIVE.

"A decree of the United States District Court is not within reach of Section 5 of the [VRA]." *Connor v. Johnson*, 402 U.S. 690, 691 (1971) (per curiam); *McDaniel v. Sanchez*, 452 U.S. 130, 138 (1981). Still, the district court did address Section 5 as part of its obligation to insure its plan did not retrogress. *Johnson III*, 922 F. Supp. at 1569 (plan does not violate Section 5).

Appellants argue the Court Plan violates Section 5 because it does not contain two minority districts. In an effort to avoid application of the DOJ's own regulations,[63]

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[60] The district in the Illustrative Plan deletes seven counties (Henry, Butts, Greene, Washington, Jefferson, Burke and Richmond). It then adds six in whole or in part (Bibb, Jones, Baldwin, Rockdale, Newton and Morgan).

[61] 116 S.Ct. at 1906.

[62] The other alternative plans have unacceptable deviations and/or retain so much of the unconstitutional gerrymandering that they do not merit serious discussion. *See, e.g.*, Amicus-R (Lewis-Gingrich Plan); Abrams Plans A, C and ACLU-IA. J.A. 191-199.

[63] 28 C.F.R. § 51.54(b). *See Ketchum v. Byrne*, 740 F.2d 1898 (7th Cir. 1984).

Appellants contend any Section 5 benchmark plan for retrogression must contain the same number of voting districts as the plan under review. R.Tr. 279-280; ACLU Brief, 47. This argument ignores two points. First, only a legally enforceable plan can serve as a benchmark for retrogression. *See* 28 C.F.R. § 51.54(b). That precludes reliance on the 1992 Plan, at least insofar as the unconstitutional districts are concerned. Second, as a practical matter, legislative districting schemes routinely add or lose seats with almost every new census. The fact that Georgia added a congressional district does not mean its last constitutional congressional plan cannot serve as the retrogression benchmark.[64]

Until 1992, Georgia had one minority district, the Fifth. It was maintained in the Court Plan with its minority population enhanced to 62%. The 1982 Plan was the only objective benchmark available to the General Assembly in 1992, and the only prior plan that has not been held unconstitutional. The 1982 Plan is the proper retrogression benchmark here.[65] Since the number of minority districts in the Court Plan is identical to that in the last constitutional plan, no retrogression has occurred.

The ACLU makes two alternative arguments under section 5. The first is that the Court Plan is retrogressive under the 1982 Plan, because the proportion of minority districts decrease if just one district out of ten is preserved when an eleventh district is added. Under this approach

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[64] Retrogression is determined by a simple measurement: "comparing the gross number of districts with minority population and voting majorities in the old plan and the number of such districts drawn in the proposed plan. This was essentially the approach taken in *Beer*." *Burton v. Sheheen*, 793 F.Supp. at 1346; *accord*, 28 C.F.R. 51.54(b); *see also Beer v. United States*, 425 U.S. 130, 141-42 (1976).

[65] *Accord Johnson v. Miller*, 929 F. Supp. 1529, 1567 (S.D. Ga. 1996) (different three judge panel hearing *Shaw* challenge to 1992 State Legislative districting plans held 1982 Plan is Section 5 benchmark).

to retrogression, any new district would have to be majority minority. Appellants contend Georgia had an obligation under Section 5 to make the Eleventh District majority black, regardless of the absence of a compact minority population entitled to political recognition under the state's traditional districting principles and under Section 2.

The ACLU next argues retrogression should be measured by comparison of the Court's Plan with various alternative plans prepared by litigants such as the DOJ. However, such an approach amounts to converting Section 5 into an ever evolving affirmative action plan.[66] Appellants' goal-oriented construction of Section 5 would create a statutory requirement that virtually all future districts be minority districts. The tension between such an interpretation and the Fourteenth Amendment would render Section 5 unconstitutional.

The DOJ did not contend the Court Plan violated Section 5 in its Jurisdictional Statement. However, it now supports the ACLU's contention that the Court Plan is retrogressive, while conceding that a reduction in minority

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[66] *See Burton v. Sheheen*, 793 F. Supp. at 1347. Counsel for the ACLU made this same argument in *Burton* as counsel for Appellant SRAC, an ACLU affiliate in South Carolina. The *Burton* court rejected the theory:

> The erroneous basis for measuring retrogression urged upon the Court by [SRAC] . . . is to compare proffered plans one to another without reference to the existing plan. This proposed methodology is flawed in at least two respects. First, it has no basis in case law, the statutes or § 5 regulations. Second, such methodology serves as a "racial ratchet" which presumes that the plan offering the greatest number of black majority districts is, for that reason alone and regardless of other considerations, the benchmark against which all other plans must be measured. Such an approach enshrines the notion that the Voting Rights Act insures proportional representation by race, a proposition that flies squarely in the face of case law and statute.

Id. at 1347-48 (citing *Beer*, 425 U.S. at 141; 42 U.S.C. § 1973(b)).

voting opportunity required to bring a state's districting plan into

> compliance with the Constitution cannot be said to be "retrogressive" in the sense used by this Court in *Beer*[67] and *City of Lockhart v. United States*, 460 U.S. 125, 133-134 (1983) . . . [and] does not violate Section 5. *See* Fed. Reg. 486, 488 (1987).

DOJ Brief, 40.

Appellants seek to avoid the consequences of this admission by contending the "application of the nonretrogression standard in this case turns on the same factors as the Section 2 argument." DOJ Brief, 36. Appellants' confusing discussion of the proper benchmark for retrogression ultimately begs the question by contending the Section 5 benchmark to be however many minority districts Section 2 requires. DOJ Brief, 43. In *Bush v. Vera*, 116 S.Ct. at 1963, this Court reiterated the limited purpose of Section 5:

> We have made clear that § 5 has a limited substantive goal: " 'to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.' " *Miller*, 515 U.S. at ——, 115 S.Ct. at 2493 (quoting *Beer v. U.S.*, 425 U.S. 130, 141 . . . (1976)).

Appellants' definition of an appropriate benchmark as "the 1992 plan modified . . . to cure its constitutional defects" is meaningless. DOJ Brief, 42; ACLU Brief, 20 at n.10. Such an amorphous definition of a benchmark plan against which to measure retrogression runs afoul of *Holder v. Hall*, —— U.S. ——, 114 S.Ct. 2581, 2587 (1994).[68] In *Holder*, the Court made clear that the

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[67] *Beer v. United States*, 425 U.S. 130.

[68] This case involved a Section 2 challenge to a single-member county commission. The plaintiffs contended the county, being 20% black, should create a five member commission of single mem-

benchmark for retrogression under Section 5 and the benchmark for judging whether a voting practice unlawfully dilutes minority voting strength under Section 2 are not the same. In a Section 5 setting, the benchmark is simply the last legally enforceable plan employed by the jurisdiction prior to implementation of the plan.[69]

Appellants have bootstrapped a Section 5 retrogression argument into this appeal. They infuse a hypothetical Section 2 type benchmark into a Section 5 retrogression analysis by the circular argument that the Section 5 benchmark is the 1992 plan "cured" of its constitutional defects. Since two of three minority districts are unconstitutional, that would, objectively speaking, leave one minority district as the retrogression benchmark. Appellants seek to avoid this inevitable conclusion by insisting the DOJ's Illustrative Plan containing two minority districts is the benchmark, based on their conclusion Section 2 requires two minority districts. DOJ Brief, 42-43.[70] Appellants simply do not properly differentiate between retrogression under Section 5 and discrimination resulting in

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ber election districts with one minority district. The plaintiffs advanced this hypothetical five-member commission as the benchmark.

[69] *See* 28 C.F.R. 51.54(b). If the plan was a legislative one, the point in time for designation of the benchmark was when the new plan is submitted for preclearance. Since court plans that are not mere clones of legislative plans are exempt from the Section 5 preclearance requirement, the relevant point in time for identification of the benchmark plan is the court plan's date of implementation.

[70] The ACLU's alternate benchmark is the first plan which contained two minority districts but was not precleared. The DOJ's own regulation, 28 C.F.R. 51.54(b), prohibits the use of unprecleared plans as Section 5 benchmarks. *See* DOJ Brief at 41. That would preclude use of the rejected first plan as the benchmark. The only other options are the precleared 1982 Plan and the precleared albeit unconstitutional 1992 Plan. Since the Fifth District is the only constitutional minority district in each, the issue is largely academic.

vote dilution violative of Section 2. *Holder* made the point unequivocally: "Retrogression is not the inquiry in § 2 dilution cases." *Holder*, 114 S. Ct. at 2587.

To offer a hypothetical "illustrative" plan that has never been enacted into law as a Section 5 retrogression benchmark conflates the two sections together so that intended differences are beyond recognition.[71] It is black letter law that statutes must be read so as not to render portions superfluous. Acceptance of the DOJ's argument violates this basic principle of statutory construction. It is this kind of thinking that drives the DOJ's maximization agenda. For the DOJ, the standard against which any voting practice is measured under Section 5 is whatever they can devise via an alternative plan. Such a hypothetical plan is not an automatic mandate for more minority districts.

Despite this Court's sharp criticism of the DOJ's misinterpretation of Section 5, *see Shaw v. Hunt*, 116 S.Ct. at 1904, the DOJ has not altered its position. The DOJ is not willing to accept this Court's repeated admonitions against defining retrogression under Section 5 in terms of what is possible rather than what was past practice. *Miller* and its progeny have not yet deterred the DOJ in its quest to create more minority districts, rather than deferring to the state sovereign or a federal court acting on its behalf.

V. THE COURT PLAN HAS A DE MINIMIS POPULATION DEVIATION BETWEEN DISTRICTS.

The one-person one-vote principle of *Reynolds v. Sims*, 377 U.S. 533 (1964), is applicable to court drawn legislative plans. *See, e.g., Chapman v. Meier*, 420 U.S. 1, 22-27 (1975). In *Connor v. Finch*, 431 U.S. 407 (1977),[72]

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[71] *Burton*, 793 F. Supp. at 1351.

[72] In *Connor*, the Mississippi Senate Plan had a deviation of 16.5%, and the House Plan had a deviation of 19.3%.

the court held a court-ordered plan designed to remedy a one-person, one-vote violation should "ordinarily achieve population equality with little more than *de minimis* variation." *Id.* at 414.[73]

A comparison of the deviations by district between the Court Plan and the DOJ Illustrative Plan are set forth below. Except for districts 2 and 3, there is little difference. The court's average deviation is .11%; the DOJ's average deviation is .07%. This .04% difference is 328 people out of a perfect district population of 588,928 people. That is *de minimis*.

DISTRICT	COURT PLAN	DOJ PLAN	BETTER DEVIATION
1	—.07	.07	same
2	—.023	.01	DOJ
3	.12	.03	DOJ
4	.07	.06	DOJ
5	.07	.09	COURT
6	.04	.11	COURT
7	.08	.09	COURT
8	—.17	.05	DOJ
9	.08	.08	same
10	—.15	.09	DOJ
11	.08	—.10	COURT

The deviations are identical in Districts One and Nine and virtually identical in Districts Five, Six and Seven. The districts that account for the entire difference in overall deviation between the two plans are Districts Two and Three where the DOJ perpetuates the racial division of

[73] "With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features." *Chapman*, 420 U.S. at 26. Georgia has a history of not dividing counties outside of metropolitan Atlanta and the "unique feature" of having 159 counties (more than any state except Texas), which the district court found to be more than enough building blocks to honor this state policy. *Johnson III*, 922 F. Supp. at 1564 n.11.

Muscogee County and the City of Columbus. Precincts are split to appropriate the requisite black population to continue the Second as a minority district. In doing this, the DOJ had the luxury, bought at the expense of the equal protection clause, of excluding whites until a near perfect deviation is arrived at between the Second and Third Districts. By ignoring the obligation to remedy the gerrymander of Columbus and to respect city, county and precinct boundaries, the DOJ was able to attain deviations of .01 and .03 in Districts Two and Three. On the other hand, the Court's obligation to remedy the racial gerrymander of this county and city provides a compelling justification for the only deviations that differ meaningfully from the DOJ's own plan—even if we ignore the adverse impact compliance with precincts lines in the DOJ Plan's 9 split counties will have on its overall and average deviation percentages.

Another justification for the difference is that the constitutional violation being remedied here is not one-person, one-vote. No one has contended the 1992 Plan, with its .93% overall deviation, and .35% average deviation was unconstitutional in that regard. Because the district court was not charged with curing any unconstitutional deviation, *Upham v. Seamon* would arguably preclude any gratuitous changes to a district just to impove the population deviation. *See generally, Johnson v. Miller*, 929 F.Supp. at 1563 n.84.

The Court Plan achieved an overall population deviation percentage below any constitutionally viable alternative plan. Appellants' contention the *de minimis* overall and average deviations achieved by the Court Plan violate the one person, one vote principle announced in *Reynolds v. Sims*, 377 U.S. 533, is contrary with the position the ACLU took in the district court. At the remedy hearing, their counsel argued that Georgia's policy of maintaining the integrity of political subdivisions would justify even a .93 percent overall deviation:

> It might well be that [the] principle of *maintaining the integrity of those counties* articulated . . . and justified in the record *would excuse the deviations of . . . .9 percent.* I suppose we are suggesting that it would because we are presenting this plan as one we think *would be acceptable.*

R.Tr. 283-284 (emphasis added). The DOJ also endorsed the ACLU sponsored plans with overall deviations in excess of .93 percent. At the hearing, the DOJ contended such deviations "comply with the . . . constitution and [VRA]." U.S. Brief on Remedy, R. 348, at 1-2; R.Tr. 414, 421-422.[74]

In contrast, the Court Plan reduced the overall deviation Appellants argued were acceptable by almost two-thirds—to .35 percent. The district court amply justified even that slight deviation by reliance on Georgia's primary districting principle of maintaining the integrity of its political subdivisions, a districting principle the ACLU Appellants acknowledged would justify this kind of *de minimis* deviation. R.Tr. 283-284. *Karcher v. Dagget*, 462 U.S. 725 (1983), often cited for the principle of not permitting a *de minimis* population deviation in congressional plans, does in fact acknowledge that:

> Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the core of prior districts, and avoiding contests between incumbent[s].

Id. at 740.

The DOJ's Illustrative Plan has little probative value as a one person, one vote benchmark for this case. First,

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[74] In their opening brief, the DOJ concedes the ACLU Plans would have to be "modified". DOJ Brief at 16-17, n.8. The DOJ never made that concession in the court below. Moreover, those modifications would necessarily mean more split counties and precincts so to increase the amount of population within the district manipulable by census block where deviations can be lowered.

the DOJ did not present the plan at the remedy hearing when the court directed all proposed plans be disclosed. Second, the plan did not respect Georgia's voting precincts, allegedly because precinct line information was not a part of the DOJ computer's programming. DOJ Brief, 19. Instead, the DOJ drew districts at the census tract level, while the Court Plan went to extraordinary lengths to honor this fundamental traditional districting principle by respecting precinct lines wherever possible.

The DOJ makes light of both its late submission, and its failure to honor precinct lines. The fact it did not follow precinct lines in the nine most populous urban counties (Cobb, Gwinnett, Fulton, DeKalb, Bibb, Fayette, Clayton, Cherokee, Muscogee), all of which were split, means that untold hundreds of thousands of voters are placed in split precincts by the DOJ's plan.[75]

Given all that is at stake, and the urgent need for finality in this matter, it is simply not enough to assure this Court that a lately proposed plan, which was not presented for scrutiny at the remedy hearing, can be "refined" on remand to comport with Georgia's right to have precinct lines respected. The issue is moot at this juncture since the DOJ never "refined" its plan before the Court Plan was implemented and this appeal was taken. The record is devoid of any evidence to prove the highly implausible assertion that a better deviation could have been achieved if precinct lines were respected.[76]

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[75] For example, the DOJ divided Bibb County between *three* different congressional districts in order to maximize the minority population excised from the City of Macon in Bibb County for inclusion in the Eleventh District.

[76] As the district court noted, it was forced to actually split a few precincts to achieve a *lower* deviation in some districts where it deemed the deviation to be unacceptable. *Johnson III*, 922 F. Supp. at 1562. Reuniting the substantial number of split precincts in densely populated urban areas can only increase the DOJ plan's deviation.

CONCLUSION

For all of these reasons, the Appellees request the Court affirm the district court's order and plan, and dismiss this appeal.

Respectfully submitted,

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September, 1996